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No. 86-463

In the Supreme Court of the United States

October Term, 1986

FRANK FIORELLO, *et al.*,
Petitioners,

vs.

EATON CORPORATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MECHANICS EDUCATIONAL SOCIETY OF AMERICA, LOCAL UNION NO. 21 AND MECHANICS EDUCATIONAL SOCIETY OF AMERICA

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QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the District Court's overruling a Motion to Alter or Amend a Judgment when a previous Motion under Fed.R.Civ.P. 56(f), alleging without any specificity that further discovery was desired, had not been ruled upon when Motions for Summary Judgment were granted.

ERRORS IN PETITION FOR WRIT OF CERTIORARI

1. Petitioner does not name the Respondents Unions correctly. The first Union Respondent is listed as "Mechanics Educational Society of America" which should be "Mechanics Educational Society of America, Local No. 21"; and the other Union Respondent is the international union which is Mechanics Educational Society of America.

2. On page 2 under Jurisdiction is cited 18 U.S.C. 2101(C) relating to riots and totally irrelevant hereto.

3. Petitioner under Opinions Below (page 1 of the Petition) does not list nor attach the District Court's decision (Memorandum and Order) on Plaintiff's Motion to Alter or Amend Judgment which was the direct judgment under appeal to the Court of Appeals (it is mentioned in the Petition on page 6). That Memorandum and Order is attached herein as Appendix A.

4. In the Affidavit of Service, the Petitioner states service was made on Respondents on September 19, 1986. It was not served until October 8, 1986 when demand was made for it by Respondents.

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ARGUMENT

There Is Not Any Reason For The Granting Of The Petition For Writ Of Certiorari

Petitioners have not stated a single reason why this case should be reviewed by the Supreme Court. And there are no such reasons on either the procedural question or on the merits.

A. On procedure, the Sixth Circuit decision does not contravene its prior decisions nor is it in conflict with other circuit decisions.

Petitioners claim discovery was cut off prematurely by the District Court but have never specified in any respect what the discovery could disclose.

The district court opinion on the Motion to Alter or Amend, reads:

> "The employees' request that they be allowed to file their response to the motion for summary judgment 60 days after an adverse ruling on their Rule 56(f) motion is also denied *nunc pro tunc* to the date of the ruling on the request for an extension of the discovery cut-off. In view of the fact that the employees elected not to file their response to the summary judgment motion on the date it was due, but instead filed their Rule 56(f) motion, thereby treating the Rule 56(f) motion as a request for yet a fifth extension of time to respond to the summary judgment motion, this Court finds it appropriate to note that the employees' request was filed at 4:08 p.m. on the day that their fourth extension of time expired. Clearly the employees were aware when they filed their request at the eleventh hour that they were incurring the risk that it would be denied, thereby placing them in the precarious position of not being able to timely oppose the motion for summary judgment. Had the employees filed a response to the motion for summary judgment during the nearly three months that followed, this Court would have considered it. The employees' time for action is long overdue."

The District Court concluded:

> "In the employees' motion for an order to alter or amend judgment, they state that they had prepared a response to the motion for summary judgment. Yet, inexplicably, they have not incorporated this purportedly prepared response into their brief in support of their motion to alter or amend. Their unsubstantiated statement that this response would 'change this Court's ruling with regard to the Summary Judgment Motion' utterly fails to convince this Court that it should change its ruling."

The Court of Appeals after relating the facts ruled:

> "This court has reviewed the decision of the trial court, the assignments of error, the record in its entirety as presented, and the briefs and oral arguments of counsel and concludes that the judgment of the district court should be AFFIRMED for the reasons articulated in the well-reasoned opinion of Judge Aldrich."

This decision is in accord with the same Court of Appeals' prior decision in *Shavrnoch v. Clark Oil and Refining Corp.*, 726 F.2d 291 (6th Cir. 1984) wherein it states:

> "As a threshold matter, the plaintiff objects to the district court's 'precipitous' entry of judgment prior to completion of plaintiff's discovery. The discovery materials which the plaintiff sought but did not receive were: 1) a price list showing the tankwagon price charged by Clark to Shavrnoch since 1976, and 2) other financial documents relating to Clark's company-operated stations. We note, however, that the plaintiff does not allege that these documents contain

information that would have created a genuine issue of material fact. *Cf. Daily Press, Inc. v. United Press International,* 412 F.2d at 135 (entry of summary judgment proper where additional discovery would not have affected disposition of case). Moreover, the plaintiff never filed an affidavit with the district court to stay consideration of the summary judgment motion pursuant to Fed.R.Civ.P. 56(f). In the absence of such an affidavit, the district court had no reason to delay entry of judgment based upon the evidence before it. See *Over the Road Drivers, Inc. v. Transport Insurance Co.,* 637 F.2d 816, 821 (1st Cir. 1980); *Thi-Hawaii, Inc. v. First Commerce Financial Corp.,* 627 F.2d 991, 994 (9th Cir. 1980); *British Airways Board v. Boeing Co.,* 585 F.2d 946, 954-55 (9th Cir. 1978), cert. denied, 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 241 (1979). See also *Adickes v. Kress & Co.,* 398 U.S. 144, 160-61, 90 S.Ct. 1598, 1609-10, 26 L.Ed.2d 142 (1970). Accordingly, we hold that the district court did not abuse its discretion by granting the defendant's summary judgment motion prior to the completion of plaintiff's discovery."

In the instant case, Plaintiffs in the 56(f) Motion gave no specifics of the discovery it wanted, but for the fifth time asked for "more" time.

The Ninth Circuit in *British Airways Board v. The Boeing Company,* 585 F.2d 946 (1979) is in accord with the Sixth Circuit, saying (on page 954):

"[16] Furthermore. even though BOAC moved for a continuance of the trial date pending completion of discovery, it never explained to the court why the depositions were necessary. Except for the brief

> statement at oral argument that the uncompleted discovery would 'further substantiate' BOAC's allegations that the fatigue cracks caused the accident by causing the fin to break off, BOAC never gave the court any reason to believe that the discovery would create a genuine dispute over a material fact. Even when BOAC moved for reconsideration of the court's ruling on October 1, 1976, it failed to argue that the uncompleted discovery would unearth a genuine issue of material fact. It was not until October 26, thirty-one days after the case was decided, and two weeks after it was appealed, that BOAC first suggested the critical nature of the missing depositions. In light of this delay, it is hard for us to consider the district court's failure to anticipate the significance of the depositions an abuse of discretion."

This Court then affirmed the District Court's granting of Motions for Summary Judgment.

There are no conflicting decisions.

B. On the merits the decision of the Sixth Circuit does not contravene any decision of the Supreme Court nor conflict with any decision of other circuits.

The District Court in granting the Union's Motion for Summary Judgment ruled on the two allegations that the Doctrine of Fair Representation was breached, holding, one, that on charges of improperly negotiating a collective bargaining agreement—the statute of limitations barred the claim; and two, that on charges of improperly handling grievances, there was no merit.

On both, the District Court was clearly correct. The Court of Appeals affirmed, stating:

> "On January 31, 1985, over two months after plaintiffs had filed their last pleadings, the district court granted the unions' motion for summary judgment, which also inured to the benefit of Eaton, concluding that the evidence then before the court disclosed that the unions had acted in accordance with all grievance procedures and the record was devoid of any conflicting material facts to reflect that the unions acted arbitrarily or in bad faith. Moreover, the court also observed that the plaintiffs' charges, anchored in alleged wrongful conduct by the unions, during the negotiation of the 1982 collective bargaining agreement, occurred more than two years prior to the date of the commencement of the instant action and was therefore barred by the six-month statute of limitations applicable to Section 301 actions against the unions. The court alternatively dismissed the action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b)."

CONCLUSION

The Court of Appeals' decision on both procedure and merits was correct and in line with its prior decisions and decisions of other circuits and does not contravene any decision of this Court. It was decided on its own peculiar facts and will not affect other than Petitioners.

There are not any special or important reasons for granting certiorari herein; neither is uniformity nor guidance in the administration of the Labor Management Relations Act needed nor is the national labor policy threatened.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

MEMORANDUM AND ORDER OF THE DISTRICT COURT RE PLAINTIFF'S MOTION TO ALTER OF AMEND JUDGMENT

(Filed March 8, 1985)

Civil Action No. C84-853

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRANK FIORELLO, *et al.*,
Plaintiffs,

VS.

EATON CORPORATION, *et al.*,
Defendants.

MEMORANDUM AND ORDER

ALDRICH, *J.*

Pending before the Court is plaintiff's motion to alter or amend judgment. Upon consideration, the motion to amend judgment is denied, but the Court's memorandum and order of January 31, 1985 is clarified as follows:

In a motion styled "motion of plaintiffs under Rule 56F" ("Rule 56(f) motion") plaintiffs ("the employees") ask this Court to defer ruling on defendant Union's motion for summary judgment until they have had an opportunity to complete further discovery. In the event that this request is denied, the employees ask for an additional sixty

(60) days to respond to the motion for summary judgment. Both requests are denied.

The employees have been granted four extensions of time to respond to the Union's motion for summary judgment. Their request for more time is premised on the need for further discovery. On October 23, 1984 this Court entered an order which stated that the September 12, 1984 discovery cut-off date had passed and all further discovery would be stayed. A subsequent request from the employees for an extension of the discovery cut-off date was denied on November 7, 1984. The employees' Rule 56(f) motion contained an identical request for more discovery. More than sixty days passed after the entry of the order denying the employees' request for an opportunity for additional discovery, yet the employees did not respond to the motion for summary judgment. Not until January 31, 1985, more than seven months after the Union's initial motion was filed, and more than four months after its supplemental motion for summary judgment was filed, did this Court rule on the unopposed motion.

In order to eliminate any ambiguity which the employees may find in this Court's November 7, 1984 ruling, this Court hereby denies the employees' Rule 56(f) motion *nunc pro tunc* with the ruling on their request for extension of discovery cut-off.

The employees have provided this Court with no explanation to support their request for additional discovery. The record in this case is devoid of any indicia of discovery disputes between the parties, and there is no indication that the employees' discovery efforts were frustrated or impaired in any way. The employees have never sought the Court's assistance through a motion to compel or other

request intended to force the defendants to provide needed information which was not supplied upon request. In fact, the record does not even contain the required report of the meeting of counsel, a meeting which this Court's standing discovery order requires the plaintiff to initiate. In sum, the record in this case does not reveal any extenuating circumstance which would convince this Court that any justification existed for extending discovery beyond the time period provided. The affidavit submitted in support of the Rule 56(f) motion does not explain why the additional facts and information needed by the employees had not yet been obtained. The record reveals that not a single deposition had been noticed during the seven months preceding this Court's order staying further discovery. If depositions could not be obtained because answers to interrogatories were lacking, the assistance of the Court could have been sought to obtain answers. Quite simply, the docket entries reveal inactivity by the employees, interrupted only by requests for extensions of time.

The employees' request that they be allowed to file their response to the motion for summary judgment 60 days after an adverse ruling on their Rule 56(f) motion is also denied *nunc pro tunc* to the date of the ruling on the request for an extension of the discovery cut-off. In view of the fact that the employees elected not to file their response to the summary judgment motion on the date it was due, but instead filed their Rule 56(f) motion, thereby treating the Rule 56(f) motion as a request for yet a fifth extension of time to respond to the summary judgment motion, this Court finds it appropriate to note that the employee's request was filed at 4:08 p.m. on the day that their fourth extension of time expired. Clearly the employees were aware when they filed their request

at the eleventh hour that they were incurring the risk that it would be denied, thereby placing them in the precarious position of not being able to timely oppose the motion for summary judgment. Had the employees filed a response to the motion for summary judgment during the nearly three months that followed, this Court would have considered it. The employees' time for action is long overdue.

In the employees' motion for an order to alter or amend judgment, they state that they had prepared a response to the motion for summary judgment. Yet, inexplicably, they have not incorporated this purportedly prepared response into their brief in support of their motion to alter or amend. Their unsubstantiated statement that this response would "change this Court's ruling with regard to the Summary Judgment Motion" utterly fails to convince this Court that it should change its ruling.

The motion to alter or amend judgment is denied.

IT IS SO ORDERED.

/s/ ANN ALDRICH
United States District Judge